The call termination charges paid by ACC under the ACC Order were the same intraLATA carrier access charges (a) that NYT had always been authorized to charge for the termination of intraLATA calls, and (b) that had been reviewed and found reasonable by the NYPSC in a series of proceedings extending over several years. Thus, the real focus of the ACC Order was whether the call termination rates paid by full service ("player") LECs should be lowered from that level.

The requirements imposed in the ACC Order, and applied in a number of subsequent NYPSC tariff orders, were intended as interim requirements pending more detailed consideration and a final resolution of the call termination issue in Case 94-C-0095, the NYPSC's inquiry into local exchange competition (commonly known as the *Competition II* case). That final resolution was announced in a September 27, 1995 order in *Competition II.*[165] In that Order, the NYPSC approved a mutual compensation proposal that applied to the termination of all intraLATA calls, toll and local, and that "establish[ed] a different, lower access charge to be paid by full service, facilities-based local exchange providers."[166] "Service providers offering only niche services (e.g., business only) and those [not] offering local exchange service (e.g., interexchange carriers) would continue to pay existing access charges."[167]

In concluding that this proposal should be adopted, the NYPSC noted that "[m]eaningful competition requires that there be alternative sources from which customers may

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[165] Case 94-C-0095, "Order Instituting Framework for Directory Listings, Carrier Interconnection and Intercarrier Compensation" (issued and effective September 27, 1995).

[166] Id. at 11.

[167] Id.

purchase dial tone."[168] Such an environment would be encouraged by the proposal's compensation framework:

> "A framework that provides lower access charges to full service, facilities-based local service providers would be likely to stimulate the development of alternative networks, and would properly reflect the risks assumed by carriers that offer the full range of telephone services through their own facilities. Where no such recognition is provided, it is not likely that carriers will have the same incentive to develop alternative sources of dial tone, or to provide a full range of services consistent with the public interest."[169]

Two aspects of the NYPSC "Play or Pay" rulings deserve emphasis. First of all, although detailed "player" criteria have not yet been articulated by the NYPSC, that Commission has liberally granted "player" or "server" status to competitive local exchange carriers. Indeed, no CLEC has been denied "player" status by the NYPSC.

Second, it is important to understand the nature of the relationship between the NYPSC's pricing construct and universal service concerns. Although, as noted above, one of the principal purposes of the Play or Pay rule was to foster the development of universal service, it was not intended to be a "funding" mechanism that would precisely allocate any subsidies associated with the provision of LifeLine, residential exchange access or other services deemed important enough to warrant "universal service" protection. It is thus independent of and consistent with such funding mechanisms (although the NYPSC recognized that the

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[168] Id. at 12.

[169] Id. See also September 27 Order at 15 n.1 ("Our approach . . . will provide an initial incentive to spur the development of alternative local facilities").

implementation of universal service funding could affect the rate levels paid by player and non-player LECs).

2. Play or Pay Is Consistent With the Act

The concerns underlying the Play or Pay construct -- the promotion of universal service and the maintenance of a level competitive playing field between server and non-server LECs -- are clearly consistent with the Act and supportive of its underlying policies.

The Act, of course, has its own detailed provisions related to universal service; these are set forth in § 254. That section mandates that all providers of telecommunications services make "an equitable and nondiscriminatory contribution to the preservation and advancement of universal service,"[170] and provides for the creation of a Joint Board to develop and modify universal service support mechanisms. However, under § 254, States also retain broad authority to adopt their own measures to preserve and advance universal service. Section 254(f) provides that:

> "A State may adopt regulations not inconsistent with the Commission's rules to preserve and advance universal service. Every telecommunications carrier that provides intrastate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, in a manner determined by the State to the preservation and advancement of universal service in that State. A State may adopt regulations to provide for additional definitions and standards to preserve and advance universal service within that State only to the extent that such regulations adopt specific, predictable, and sufficient mechanisms to support such definitions or standards that do not rely on or burden Federal universal service support mechanisms." [171]

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[170] § 254(b)(5).

[171] See also § 253(b) (States are empowered to impose, on a competitively neutral basis and consistent with § 254, requirements to protect and advance universal service and a number of other public interest goals). Legislative history makes clear that explicit prohibitions on

The NYPSC's Play or Pay rule is clearly a state regulation that "preserve[s] and advance[s]" universal service; it is, moreover, "specific" and "predictable." And, since it is not intended as a funding mechanism, it should neither rely on nor burden federal support mechanisms.[172]

The intent of Congress in enacting § 254(f) was to provide maximum flexibility to the States in developing mechanisms to foster universal service. In the Senate Report, the Commerce Committee stated that "[t]he FCC and the States may impose or require various mechanisms to enforce any contribution ... [which] may include service obligations, financial contributions, discounted rates, or any other mechanisms that the FCC or States find appropriate." The Play or Pay mechanism is clearly within the broad scope of the types of State provisions that the Act was intended to authorize.

The NYPSC's Play or Pay rules are clearly equitable and nondiscriminatory under § 254(f). They are "equitable" because they advance important State policies — universal service and competitive equity — policies which, moreover, are also supported by federal law in general and the 1996 Act in particular. The differential rates involved in Play or Pay cannot be considered discriminatory since they recognize bona fide differences between players and non-

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entry into telecommunications are pre-empted, but States have wide authority to take steps to pursue other objectives (including public safety, welfare, quality of services and consumer rights). See Conference Report, Joint Explanatory Statement at 35.

172 Of course, to the extent that Play or Pay was also intended to level the competitive playing field by recognizing the greater burdens that "full service" providers confront, its policies are unquestionably legitimate and need not be justified under § 254(f).

players. "Discrimination" means differential treatment of *similarly situated* carriers. Players and non-players are not similarly situated; the former have accepted obligations and burdens that the latter have not. (Moreover, any carrier can choose to accept those obligations and become entitled to the lower termination rates.)

Even if the rates were considered to be "discriminatory" in the technical sense, it is clear that the anti-discrimination provisions of the 1996 Act, like those of the 1934 Act, only prohibit discrimination that is unreasonable. The rate differentials mandated by the NYPSC advance important competitive and universal service policies, and do so in a narrowly drawn manner. They therefore cannot be considered unreasonable. Indeed, it is the *failure* to implement Play or Pay, or some similar mechanism, that would be discriminatory since it would impose upon players a greater net burden of providing service.

Finally, the Play or Pay regime is consistent with the requirements for "mutual compensation" established by §§ 251(b)(5) and 252(d)(2) of the Act. These provisions do not require that the call termination rates paid by Carrier A to interconnecting Carrier B equal the call termination rates paid by B to A. There is no statutory requirement of symmetry, and one should not be read into the Act by implication. Moreover, the statute itself only requires that the termination rates established provide for the recovery of costs in each direction ("the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network"), not that the rates be equal or that they be limited to levels sufficient to recover cost. (A symmetry obligation would actually be inconsistent with that provision, since the costs of the two interconnecting carriers may be quite different.) The symmetry issue is one that should be left to the States.

B. Piece-Parts Of Agreements

Finally, the Commission inquires whether it should make available to other carriers each of the individual provisions of agreements under Section 252 (a) (NPRM ¶ 271). The answer is that it should not. As the Commission itself acknowledges, these agreements will be the result of negotiation, trading concessions between the parties. It will be difficult enough to reach voluntary agreements through such negotiations. To require that each provision be exquisitely balanced for incorporation into a wholly different negotiation process is to risk breakdown altogether. Further, it is not necessary where, as here, a third party will be able to claim the non-discriminatory benefit of the entire agreement if it so chooses.[173]

XIII. CONCLUSION

The Commission can best accomplish its task of establishing a pro-competitive, deregulatory national framework for the telecommunications industry by focusing on and distinguishing between the Act's very specific and different obligations regarding interconnection, unbundling, resale, reciprocal compensation and pricing. The Commission must be careful not to create a new set of detailed rules and regulations that will hamper the development of competition, burden incumbent LECs and diminish the role reserved to the

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[173] NYNEX believes that the statement in the March 23, 1995 Report on S.652, referenced by the Commission in the NPRM, refers to making LEC network elements, not contractual provisions, available to all carriers.

States by the Act. Consistent with Congress' intent, the Commission should allow carriers to achieve interconnection through voluntary negotiations.

Respectfully submitted,

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